IN THE HIGH COURT OF JUDICATURE AT BILASPUR, C.G.

WRIT PETITION NO. 2540 /2005

(Petition under article 226/227 of the Constitution of India)

PETITIONER : Teras Ram, S/o Babulal Kurmi, aged about 37 years, R/o village Kansa, Tahsil Navagarh, Distt. Janjgir-Champa (C.G.)

P.R. No. 2632/05
Presented by Shri V. Shrivastava
dated 15.12.05

VERSUS

RESPONDENTS :

1) Sub Divisional Officer (Revenue cum Competent Authority) Janjgir, Distt. Janjgir-Champa C.G.

2) Dwas Ram, S/o Paras Ram, R/o village Kansa, Tahsil Nawagarh, Distt. Janjgir-Champa, C.G.

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3) Returning Officer (panchayat) Janpad panchayat Janjgir (Nawagarh) Distt. Janjgir-Champa, C.G.

4) Presiding Officer, polling booth no.230, Gram panchayat Kansa, Janpad panchayat Janjgir (Nawagarh) Distt. Janjgir-Champa, C.G.

5) State of Chhattisgarh, through the Collector cum District Election Officer, Janjgir, Distt. Janjgir-Champa, C.G.

उपायुक्त एस. के. पाण्डेय बिलासपुर (छ.ग.) बिलासपुर तहसील कोर्ट

WRIT PETITION UNDER ARTICLE 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF APPROPRIATE WRIT OF MANDAMUS/ CERTIORARI, ORDER/ORDERS, DIRECTION/DIRECTIONS ETC.

APR
(45)

HIGH COURT OF CHHATTISGARH, BILASPUR

W.P.No.2540 OF 2005

Teras Ram
Vs.
Sub-Divisional Officer
(Revenue-cum Competent Authority) and others

ORDER

Post for 20.02.2006

Sd/-
Sunil Kumar Sinha
Judge

Seen.
Krishna
Counsel for Petitioner

(46)

HIGH COURT OF CHHATTISGARH, BILASPUR

W.P.No.2540 OF 2005

Teras Ram
Vs.
Sub-Divisional Officer
(Revenue-cum-Competent Authority) & others

Shri Vishnu Koshta, counsel for the petitioner.

Shri Arun Sao, Deputy Govt. Advocate, for the State/ *respondents no.1,3,4 & 5.*

Dr. Shailesh Ahuja, counsel for respondent no.2.

O R D E R

(20.2.2006)

Sunil Kumar Sinha, J

A short question involves for consideration in this writ petition as to whether an election petition filed under section 122 of The Panchayat Raj Adhiniyam 1993 (hereinafter referred to as the Act), mainly with the prayer of recounting of votes, would be maintainable in absence of a request for recount at the time of counting before the returning officer under Rule 80 of the M.P. Panchayat Nirvachan Rules (hereinafter referred to as the Rules 1995) ?

(2) The brief facts are that the petitioner and respondent no.2 contested election for the post of Sarpanch of Gram Panchayat Kansa, Distt. Janjgir Champa (C.G) on 15.1.2005. The total number of votes cast in the election was 526. The petitioner polled 250 votes whereas the respondent no.2 polled 252 votes and 24 votes were declared invalid. The result of the election in Form-17 under Rules 77(2) and 80(3) was published on 18.1.2005 (Annexure P-3) and in this manner the respondent no.2 was declared elected by a margin of two votes. The petitioner challenged the validity of the election before

the specified officer under section 122 of the Act 1993. He mainly raised the ground that the returning officer had informed the petitioner that 527 ballot papers have been used in this election, whereas the total number of ballot papers used comes as 526 as per the result sheet, therefore, one ballot paper is missing. He also raised the ground that 5 votes which were cast in favour of the petitioner have wrongly been declared invalid and for this an oral request was made by him before the returning officer at the time of counting but the same was rejected and ultimately, the results were declared. The contention was that if the recounting is done, he would be declared elected with the aid of those 5 votes which have been illegally declared invalid by the returning officer and for this reason the main prayer in the election petition was for recounting of votes.

(3) In reply before the Tribunal, the respondent no.2 denied the contentions of the petitioner and submitted that the counting was properly done and no case for recounting is made out. He further submitted that since no application for recounting was given by the petitioner, at the time of counting of votes, therefore, the election petition on these grounds for recounting cannot be entertained.

(4) The specified officer heard on the maintainability of the election petition on the ground of non-filing of an application for recounting before the Returning Officer and held that since an application for recounting was not given by the petitioner, under rule 80 of the aforesaid rules, an election petition making a prayer for recounting was not maintainable and on this ground only he dismissed the election petition on 31.5.2005. It is against this order, the petitioner has filed this writ petition.

(5) The contention of learned counsel for the petitioner is that in view of the recent decision rendered in the matter of ***Sohanlal –Vs- Babu Gandhi and others, AIR 2003 S.C.320***, the election petition filed u/s 122 of the Act, cannot be dismissed on the ground that an application under rule 80 of the aforesaid Rules was not filed before the returning officer. Per contra, learned counsel for respondent no.2 submitted that the aforesaid law would not be applicable in this case and the specified officer has rightly rejected the election petition at the preliminary stage on the aforesaid ground.

(6) I have heard learned counsel for the parties at length and have also perused the records of the writ petition.

(7) It was held by the Apex Court in the matter of ***Smt. Ram Rati –Vs- Saroj Devi, AIR 1997 S.C. 3072*** that unless a party first applies to the Returning Officer for recounting of votes, it is not open to the Tribunal or the Court to direct recounting. It was held that an application for recounting in writing to the Returning Officer was an essential pre-condition.

(8) In the matter of *Sohanlal –Vs- Babu Gandhi (Supra)* the Apex Court while dealing with almost the same points considered the earlier decision rendered in the matter of *Ram Rati –Vs- Saroj Devi (Supra)* and held that the ratio laid down in the said case is not correct. Considering the provisions of section 43, 195 & 122 of the Act and Rule 80 of the aforesaid Rules, the Apex Court held in this matter that under Sub-Rule(5) of Rule 80, once the result sheet is completed and signed no application for recount can be entertained. It was also held that rule 81 also provides that after counting of the votes, the Returning Officer shall prepare a return and declare the

candidate who has the largest number of votes to have been elected. Under rule 83, a certificate is to be granted to the returned candidate who has been declared elected. Under rule 84, after the certificate has been granted, the election officer or the Returning Officer can only correct the clerical or arithmetical mistakes. Therefore, after declaration of results, the Returning Officer has no power either to recount or to change the results of the election. Once the result is declared, the only remedy of an aggrieved party is an election petition under section 122 of the Act. Therefore, it was held that it is not correct to hold that in an election petition, after declaration of the result, the Court or Tribunal cannot direct recounting of votes unless the party has applied for recounting of votes. There is no prohibition in the Act or under the Rules prohibiting the Court or Tribunal to direct the recounting of votes. Even otherwise a party may not know that the recounting is necessary till after result is declared. At this stage, it would not be possible for him to apply for recounting to the Returning Officer. His only remedy would be to file an election petition u/s 122 and in such a case, the Court or Tribunal is bound to consider the plea and where the case is made out, it may direct recount depending upon the evidence led by the parties.

(9) Shri Ahuja learned counsel for respondent no.2 referred to the decision rendered in the matter of ***M.Chinnasamy -Vs- K.C. Palanisamy and others (2004) 6 SCC 341*** and argued that after considering numerous decisions including the decision on Ram Rati's case (supra), the Apex Court laid down the principles on which a petition for recount of votes would be entertained.

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(10) It is important to mention here that in the said decision, the Apex Court has only referred the decision of Ram Rati's case in chronological reference of the cases decided on the question of recounting and ultimately the Apex Court held that the law operating in the field is no longer *res integra* and the inspection of the ballot papers can be ordered when in the facts and circumstances obtaining in the case, the Tribunal finds it necessary to so direct in the interest of justice. Discovery and inspection of documents with which the civil court is invested with power under the Code of Civil Procedure when trying a suit may be applied, but such an order would not be granted as a matter of course having regard to the insistence upon the secrecy of the ballot papers. Such an inspection may be ordered when two conditions are fulfilled:

(i) that the petition for setting aside an election *contains an adequate statement of the* material facts on which the petitioner relies in support of his case; and

(ii) the tribunal is prima facie satisfied that in *order to decide the dispute and to do* complete justice between the parties inspection of the ballot papers is necessary.

The Apex Court further held that in relation to an election petition, the provisions of Code of Civil Procedure would apply and an order of recounting of votes can be passed when the following ingredients are satisfied.

(i) if there is a prima facie case;

(ii) material facts therefor are pleaded;

(iii) the court shall not direct re-counting by way *of roving or fishing inquiry; and*

(iv) such an objection had been taken recourse to

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In this judgment, the decision rendered in the matter of *Sohanlal –Vs- Babu Gandhi (supra)* is not cited. In fact, this is not a decision on the point of refusal of entertaining an election petition for recounting on the ground that an application for recounting was not given at the time of counting of votes. Hence the law, which holds the field on the point is the law rendered in the matter of *Sohanlal –Vs- Babu Gandhi* (supra) that an election petition filed u/s 122 of the Act for recounting of the votes cannot be dismissed on the ground that an application under rule 80 of the aforesaid Rules was not given before the Returning Officer by the petitioner.

(11) In the result, the petition is allowed and the impugned order dated 31.5.2005 passed by the Specified Officer is set aside. The matter is remanded back to the Specified Officer and he is directed to dispose of the election petition on merits, in accordance with law, keeping in mind the observations made by this Court in this order referring to the decision rendered in the matter of *M.Chinnasamy – Vs- K.C.Palanisamy (supra)*. No order as to costs.

Sd/-
Sunil Kumar Sinha
Judge

/Rao/